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January 16, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TWB-204
Washington, D.C. 20554

Re: In the Matter of: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket 98-147 - *Ex Parte Notification*

Dear Ms. Dortch:

Today, the undersigned, along with Ed Cadieux, Vice President, Regulatory Affairs – Midwest Region of NuVox, Inc., met with Commissioner Copps' legal advisor, Jordan Goldstein, to discuss NuVox's position on various issues raised in the above-captioned dockets. The conversation focused on high-capacity loops, transport and EELs and we expressed positions consistent with comments, reply comments, and various *ex parte* filings filed by NuVox in those dockets. Copies of NuVox's January 10, 2003 and January 15, 2003 *ex partes* were distributed at the meeting and are attached hereto.

In accordance with Section 1.1206 of the Commission's rules, an original and one copy of this letter is being submitted for filing with your office.

Respectfully submitted,

John J. Heitmann

JJH/cpa
cc: Jordan Goldstein
Qualex International

DC01/HEITJ/197927.1

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January 10, 2003

Ms. Michelle Carey, Chief
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Ex Parte***
CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Carey:

On behalf of NuVox, SNiP LiNK, Xspedius, and KMC Telecom, I am writing to provide further information for the Commission's consideration in the above-referenced dockets regarding access to EELs. Specifically, I am writing to propose a modified version of the "restriction", "constraint" or "gating mechanism" that ALTS, NuVox, SNiP LiNK and Xspedius proposed previously.[1]

If the Commission is inclined to adopt some sort of restriction on conversions (despite an apparent consensus that the current "interim" restrictions have imposed burdens unintended and greater than any benefit gained) or on EELs more generally (despite the fact that CLECs have had unrestricted access to EELs in more than 10 states, including in Georgia and Texas[2] for years with no dramatic consequences to the ILECs in those states), we believe that the test proposed herein provides a manageable framework that serves the goal of denying access to EELs where

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1 ALTS, NuVox, SNiP LiNK, Xspedius *Ex Parte,* WC Docket Nos. 01-338, 96-98, 98-147 (Dec. 13, 2002).

2 Unrestricted EELs have been available in all 5 SBC/Southwestern Bell -region states via the "2A" interconnection agreements, and in six BellSouth states via interconnection agreements, state commission decisions, and in Density Zone 1 of the Top 50 MSAs where ILECs have elected to avail themselves of the circuit switching carve-out by making new EELs available (*e.g.*, all BellSouth markets in the Top 50 MSAs, including Atlanta, Miami, Charlotte, Nashville, New Orleans and others).

the Commission might determine that no impairment exists (*i.e.*, in the interexchange services market), while promoting competition for local voice and data and broadband Internet access services and limiting opportunity for ILEC and IXC gaming. Notably, our framework continues to include a bright-line standard that has been revised to eliminate the need for audits, if certain precertification criteria are met, while otherwise preserving the potential for an ILEC audit in circumstances where such measures are not met.

The modified framework we propose here is intended to benefit a broad group of CLECs rather than one specific business plan or technology. It is intended to allow CLECs to use EELs to compete directly with the Bells and other ILECs in the provision of "local exchange company" services that the Bells have traditionally offered and for which they do not need 271 authority or a 272 affiliate to do so. Accordingly, our proposal (1) denies access to carriers seeking to use EELs exclusively for long distance/interexchange service, including not only long distance voice services but also long distance data services (*e.g.*, interexchange frame relay), and (2) allows access for the provision of bundled service offerings that may include local voice, local data, Internet access, exchange access and interexchange services (but not exclusively interexchange services).

Notably, our proposal includes no local voice requirement. The Bells have never had one and continue to compete without one. When CLECs compete, CLECs need the same flexibility as they have to offer T1 products that include "a full T" of Internet access or a full T of point-to-point local data transmission. The Bells have always provided these Internet access and local data services as "local exchange carriers" (without having to impute special access costs in their provision); CLECs have, in some circumstances, been able to do the same under the Commissions existing rules (Safe Harbor Option 1, in particular)[3]; and, in order to compete effectively, CLECs need to be able to continue to do so (without an "exclusive" or "primary" provider restriction which the Bells themselves are not saddled with).

Similarly, and most importantly, CLECs need to continue to be able to use EELs to provision their "integrated T1" product offerings over which they provide a bundle of services that typically include local voice, Internet access, and exchange access (long distance service is also offered in conjunction with exchange access). CLECs such as NuVox, SNiP LiNK and Xspedius have introduced the integrated T1 product to a market hungry for broadband and advanced telecommunications solutions at affordable prices. Facing no competition, the Bells had ignored this market for years, as they essentially trapped these customers into a variety of more expensive narrowband product offerings. Notably, CLECs have brought this product

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[3] Under safe harbor option 1, a carrier may dedicate an entire T1 of bandwidth to data and/or Internet access, so long as it serves as the end user's exclusive local service provider. In such instances, voice services may be provided on a parallel DS0 EEL or T1 EEL.

"down market" and, as a result, frequently deliver broadband to customers who never before had access to it.

It is only because of this UNE-based competition that the Bells recently have begun to roll-out their own integrated T1 bundled service offerings. Notably, these offerings are not subject to FCC-imposed "significant local use" constraints. ILECs are free to offer any mix of local voice, local data, Internet access, exchange access and long distance over such circuits – or they may devote the entire circuit to local data or Internet access (which the BOCs have long provided with no help from their 271/272 long distance affiliates). In states where CLECs have had access to new EELs (either per state order or per the circuit switching exemption), such access typically has been unrestricted and CLECs have enjoyed the freedom to be able to offer attractive broadband data and Internet access solutions to customers at reasonable prices. As Cbeyond noted in its December 16, 2002 *ex parte*, new EELs result in new wholesale revenues for the ILECs and not the displacement of legacy special access revenues associated with the traditional long distance business.[4]

If the Commission feels the need to adopt some restriction or gating mechanism, it must ensure and not curb the continued development of this important form of facilities/UNE-based innovation and broadband competition. In doing so, it is important that the Commission avoid placing upon CLECs burdens not faced by the Bells and other ILECs. As indicated above, CLECs can compete successfully only if they can use EELs in the same manner as the ILECs. Moreover, the broadest group of CLECs will be left behind, if the Commission's rules are inadvertently tailored to the particular business plan and technology of one facilities-based CLEC, rather than many. As we discuss below, we fear that may be the consequence if the Commission were to adopt the most recent proposal offered by Cbeyond.[5]

Prior to January 6, 2003, our advocacy and Cbeyond's had been very much in accord. We note, however, that in its January 6, 2003 *ex parte* Cbeyond submitted its latest alternative proposal that includes a brand new requirement of providing "primary local exchange service" and certain unnecessarily complex and burdensome evidentiary requirements by which a carrier could indicate compliance with that criterion. While we give credit to Cbeyond for its attempt to craft an improvement over the existing safe harbor regime, for the reasons discussed below we believe the particular plan Cbeyond has introduced in its January 6 filing is inherently too restrictive in large part because it is born out of a specific technology and business plan unique to Cbeyond.

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4 Cbeyond *Ex Parte,* WC Docket Nos. 01-338, 96-98, 98-147 (Dec. 16, 2002).

5 Cbeyond *Ex Parte,* WC Docket Nos. 01-338, 96-98, 98-147 (Jan. 6, 2003).

Cbeyond, like NuVox, SNiP LiNK, Xspedius, KMC and other CLECs, depends heavily on the integrated T1 product offering. As is true to varying degrees with the others, Cbeyond sometimes serves mid size customers (or meets the growing needs of its smaller customers) with a "parallel" or second T1. Often, customer growth is generated by Internet access and data transmission needs. Accordingly, in these situations the second T1 is often dedicated to providing a full T1 of bandwidth to the customer. As we understand it, Cbeyond's technology puts it in the relatively unique position of being able to "meld" the bandwidth of two T1s together. Thus, making a commitment to provide local voice services on all EELs is less of an issue for Cbeyond, as it can technically apportion voice traffic to each of the circuits that have been melded, while still offering its customers a full T1 (or more) worth of Internet access. Moreover, Cbeyond's business plan (as we understand it) does not contemplate the sale of competitive local data and Internet access products that may be made available to end users without demanding that they give up their familiar ILEC voice service. This, too, makes Cbeyond different from many CLECs and, for that reason, makes it easier for Cbeyond to cede that opportunity to compete head-on with the ILECs by including a local voice requirement in its EELs test.

Critically, Cbeyond's suggestion that CLECs should have to provide local voice services, assign numbers and provide 911 on EEL lines ignores the fact that these are all things that the Bells do not have to do when offering competing T1 products. While each component of Cbeyond's recalibrated "primary local exchange service" standard would certainly provide indication that the CLEC is in fact competing directly with the ILEC and not using the circuits exclusively for long distance services, by apparently making each component a requirement, Cbeyond's proposal does far more than it needs to. In so doing, it is likely to have many of the same unintended consequences that have plagued the current "interim" restrictions.

By introducing the brand new concept of "primary" local exchange service or even "primary" local exchange carrier (a logical but troublesome extension of the standard proposed by Cbeyond), Cbeyond enters uncharted and dangerous waters.[6] Although intended to create a bright line, we fear that Cbeyond's proposal creates new and fertile ground for ILEC mischief. The Commission ought not start a debate about what "primary" means now or encourage a debate that will inevitably be played out in enforcement proceedings before it or state commissions. Like the measurement and sole provider criteria it is intended to replace,

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[6] We also fear that such a proposal will lead CLECs back into the stormy seas that prevail currently. Although Cbeyond clearly defines "primary" in a manner so as to avoid measurement issues (and we appreciate Cbeyond's doing so), we fear that use of the term will nevertheless invite measurement oriented squabbles and end user policing issues of the type that have plagued all three of the current safe harbors.

Cbeyond's business plan and technology specific proposal invites myriad proof and compliance issues that will inevitably retard innovation and encumber CLECs' ability to compete head-on with the ILECs and deliver local and broadband services to consumers.

NuVox, SNiP LiNK, and Xspedius believe that the following proposal presents a better alternative that will benefit a broader group of CLECs and consumers. The proposal incorporates some aspects of Cbeyond's proposal – and even aspects of a proposal made by Qwest – into a modified proposal that seeks to address the desire for a bright-line rule that eliminates or alleviates the potential for resource consuming audits. The proposal builds on the standard initially proposed on November 14, 2002 by ALTS and includes a presumption of compliance that can be assured either through pre-certification that certain indicia of compliance are met or through post-certification audits in the absence of pre-certification.

Given competitive carriers' disappointing experience with the waiver opportunity associated with the current constraints, NuVox, SNiP LiNK, Xspedius, and KMC Telecom do not at this time choose to expressly incorporate the waiver procedure previously endorsed by Cbeyond into our proposal. By offering a menu of indicia of compliance (to which we invite others to propose reasonable additions), rather than affirmative requirements that have the potential to force CLECs to jump through a series of hoops not contemplated by their business plans, provisioning and sales methods, technology or network architecture, coupled with the option of foregoing pre-certification of compliance in favor of post-conversion, verification via limited, probable cause-based audits, we hope to eliminate the need for waiver applications (although we by no means mean to proscribe any CLEC's right to file one).

Thus, in the event that the Commission determines that the record supports adoption of new constraints applicable to converted EEL circuits or even new EELs, NuVox, SNiP LiNK, Xspedius and KMC Telecom propose the following bright-line constraint:

> **A requesting carrier may not convert SPA circuits to EELs if such circuits are used to serve a customer for which the requesting carrier provides no local voice or local data or Internet access services in competition with the ILEC.**
>
> Compliance with this constraint can be verified via limited post-provisioning probable cause-based audits or, at the CLEC's option, by pre-certification that at least two of the following compliance indicia are met:
>
> - the circuit is connected to a collocation in an ILEC end office; or
> - the CLEC has active local interconnection trunks with the ILEC in the LATA; or
> - the CLEC offers local voice, local data and/or Internet access in the LATA; or
> - the CLEC assigns a local telephone number associated with the circuit; or

- the circuit is not served by a switch that is used exclusively to provide long distance service.

An ILEC may file an enforcement action at the FCC or state commission, if it has reason to believe that the CLEC has falsely pre-certified compliance or that it no longer remains in compliance with the bright-line rule set forth above.

At a CLEC's option, it may opt not to pre-certify compliance with any of the above indicia and instead accept that an ILEC may audit its compliance with the bright-line rule set forth above. Such audits must (a) be triggered by a probable cause standard – a demonstrable and rationally related concern regarding compliance – no random or routine audits; (b) be conducted by an AICPA-compliant independent third party auditor acceptable to both parties; (c) not require burdensome production or record keeping; (d) be limited to once in a twelve month period - barring finding of more than de minimis (>10%) non-compliance (which would justify a one audit per six month period standard until an audit uncovered no more than de minimis (>10%) non-compliance); (e) be paid for by the ILEC – with cost shifting on a pro-rata basis, if certain circuits are found to be ineligible; (f) be subject to state PUC or FCC review prior to any true-up or switch to SPA rates.

NuVox, SNiP LiNK, Xspedius, and KMC Telecom hope that this revised proposal advances the debate on this issue and offers the Commission a well reasoned and legally defensible solution, should it identify a need to constrain access to EELs in any way. We acknowledge that our proposal provides no absolute guarantee against gaming by either ILECs or IXCs. We can think of no test that will eliminate all possibilities of gaming and any need for enforcement activity. However, the Enforcement Bureau remains charged with ensuring compliance with the Commission's rules. Please do not hesitate to contact me, if I can provide additional explanation or responses to additional questions or concerns.

Respectfully submitted,

John J. Heitmann

JJH:cpa

cc: Tom Navin
Jeremy Miller
Julie Veach
Mike Engel
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January 15, 2003

Mr. Christopher Libertelli
Legal Advisor
Office of Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Ex Parte***
CC Docket Nos. 01-338, 96-98, 98-147

Dear Mr. Libertelli:

On behalf of NuVox, I am writing to provide further information for the Commission's consideration in the above-referenced dockets regarding access to EELs. Specifically, I am writing to comment on the concept of "primary local provider", "primary local exchange carrier", or "primary local exchange service" and to respectfully submit that:

(1) the concept of **"primary local provider"** (or similar) is *not* one that should be incorporated into any use restriction that the Commission ultimately may determine is necessary in association with its application of an impairment standard; and

(2) if the Commission is attempting to determine whether CLECs are using EELs to compete directly with the ILECs and are not predominantly IXCs attempting to replace their embedded base of special access circuits used to provision interexchange voice and data offerings, it should instead focus on whether a CLEC seeks to use the EEL to effectuate its general offer of any, some or all **"LEC services"**, which we define to include local voice, exchange access, Internet access, and point-to-point local data services.

Tying any constraint to the offering and provision of "LEC services", rather than a "primary local provider" standard, would sufficiently address any desire the Commission might have to obtain additional assurance (beyond carriers' ordinary commitment to adhere to the Commission's rules and the Commission's unquestioned authority to enforce such rules) or indication that an IXC is not using EELs predominantly to replace special access services, upon which it historically had relied to facilitate its provision of interexchange services, without demonstrating a significant adjustment in its business plan, as evidenced by a general offer of LEC services and the use of the circuit to provision LEC services (and not solely to facilitate the provision of interexchange services).

A "primary local provider", "primary local exchange carrier", or "primary local exchange service" criterion – even with careful definition – is a tremendously problematic as it easily result in:

(1) arbitrary line drawing ("what constitutes primary?", "will it limit competition to local voice competition?", "will the Commission pick a percentage of some sort?", "how will it apply, and on what basis?"),

(2) measurement problems ("why should we have to measure things we don't or can't measure and that the ILECs don't have to measure?"),

(3) policing problems ("why should the ILECs police CLECs?" and "why should CLECs have to police their customers?"),

(4) regulations that unnecessarily stymie competition ("will the ILECs be able to (mis)use this standard to assist in their efforts to kill UNEs as a viable entry method?") and retard innovation ("is there undue risk in doing something differently, more efficiently, or better than the ILEC?"),

(5) a public relations problem for CLECs that may be forced to raise rates or abandon certain market segments and that may be forced to once again to revamp business plans based on yet another new set of rules and convince investors that they should be more patient still.

For all of these reasons and more, the concept of "primary local provider" should *not* be incorporated into the Commission's impairment analysis or any use restrictions that may some how derive therefrom.

NuVox respectfully submits that a better approach, if such an approach need be taken at all, would be for the Commission to make a qualifying determination that takes into account a

CLEC's business plan, as revealed by its offering of LEC services in direct competition with the Bells and other ILECs. In particular, the Commission could request precertification that a CLEC offers any, some or all LEC services (local voice, exchange access, Internet access, and point to point local data). For example, NuVox's business plan contemplates its making available "integrated T1" service offerings that may include all, some or one LEC service(s). NuVox's most popular product is an integrated T1 product that includes local voice, exchange access, and Internet access over an integrated T1. NuVox also offers T1 products that allow customers the flexibility of keeping ILEC voice services while using NuVox for Internet access or point-to-point local data. NuVox also offers T1 products that allow customers to choose NuVox for their local voice and local data needs (typically Internet access) and for offering exchange access to an IXC other then NuVox (NuVox currently resells long distance services to a majority of its customers but does not have a stand-alone long distance service offing). To provide these LEC services, NuVox has made significant investments in switching equipment, collocations (and associated equipment), and integrated access devices deployed at customer premises.

NuVox offers this profile not to suggest that other CLECs need to do things as NuVox does them, but rather to demonstrate that its business plan, as reflected not only by its highly successful bundled, "integrated access device"-provisioned T1 products, but also by its separate Internet access and point-to-point local data only T1 service offerings, indicates that NuVox intends to and does compete with the Bells and other ILECs head on in the provision of LEC services to small and medium sized business customers across its various markets. DS1 EELs (and DS1 UNE loops) are an essential ingredient to the success of this business plan and NuVox's ability to make these service offerings available at affordable prices to small- and medium-sized business customers.

In light of the foregoing, NuVox offers a modified version of the use restriction it had proposed on January 10, 2003, in an *ex parte* Letter to Michelle Carey jointly filed with SNiP LiNK, Xspedius and KMC Telecom, that should be considered only if the Commission deems use restrictions necessary.[1] As with NuVox's prior proposal, this constraint balances the need for flexibility to accommodate various CLEC business plans with the perceived need to discourage gaming by IXCs and the *demonstrated need* to eliminate opportunities for gaming by ILECs. For that reason, the constraint proposed continues to incorporate a bright-line rule (that would have to be supported by an impairment analysis) and a menu of criterion (adjusted here in some respects) by which a CLEC may pre-certify its meeting various easily discerned indicia of

[1] In addition to modifying its proposal to include the term "LEC services", NuVox also has (1) replaced the switching indicia with a CLEC certification indicia, (2) clarified the interconnection trunks indicia to account for the fact that interconnection trunks may in some cases be ordered through the ASR or as dedicated transport UNEs, per specific terms of interconnection agreements or SGATs, and (3) expanded upon the collocation indicia to better account for the varying network architectures of other CLECs. Modifications to the January 10, 2003 proposal are highlighted in the modified proposal attached hereto.

compliance with the rule. Such pre-certification is intended to eliminate the need for audits which already have wastefully consumed too many resources. It should also limit the need for enforcement, which the Commission and or the states, nevertheless, ultimately remain charged with ensuring.

The modified constraint proposed herein contains a "2 out of 5" standard, which the Commission may consider modifying itself, for example to require compliance with a third criterion (making it a "3 of 5" standard), or perhaps one of two or more alternative third criteria (making it a "2 plus 1 of 3" standard). If the Commission were inclined to do so, NuVox requests that it strive to continue to contemplate the various business plans of CLECs that seek to use EELs to provision any, some or all LEC services. By including alternatives and avoiding a long list of required criteria, the Commission can, if it chooses to go down this road again, (1) avoid relegating CLECs to one part of the local market by including a mandatory local voice requirement, and (2) accommodate the needs of a broader segment of facilities-based CLECs that have varied business plans and network architectures, but nevertheless currently are delivering the benefits of competition and broadband through their provision of competitive LEC services.[2]

NuVox's revised proposal is attached hereto. As with our prior submissions in this regard, this submission is designed to address the desire the Commission may have to find that carriers that offer only interexchange services and do not intend to offer LEC services in a meaningful way not be able to convert their base of special access circuits to EELs. And, again, I must underscore that it is NuVox's view that use restrictions have had detrimental consequences beyond any possible benefit and that their continued application on conversions from special access to EELs – or their introduction with respect to new EELs – will provide fertile ground for ILEC gaming, caste a dark cloud on the prospects of all facilities-based CLECs that have built a business that incorporates the use of UNEs, and delay the benefits of competition and availability of broadband to wide swath of end users hungry for such benefits. In short, application of the impairment test, coupled with enforcement, is all that is required. Experience has confirmed that use restrictions are a bad idea that should be eliminated and neither continued nor expanded.

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[2] Wholesale CLECs may, at their option, and in lieu of their own precertification, may offer precertification by the CLEC using its wholesale service offerings in the provision of retail services.

It is our hope that this submission advances the debate further still on these extraordinarily critical matters. Please do not hesitate to contact me, if I can provide additional explanation or responses to additional concerns.

Respectfully submitted,

John J. Heitmann

JJH:cpa

cc: Matt Brill
Jordan Goldstein
Dan Gonzalez
Lisa Zaina
Bill Maher
Jeff Carlisle
Michelle Carey
Tom Navin
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Julie Veach
Mike Engel
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Mr. Christopher Libertelli
January 15, 2003
Attachment

A requesting carrier may not convert SPA circuits to EELs if such circuits are used to serve a customer for which the requesting carrier provides no LEC services (local voice or exchange access or Internet access or local data services) in competition with the ILEC.

Compliance with this constraint can be verified via limited post-provisioning probable cause-based audits or, at the CLEC's option, by pre-certification that at least two of the following compliance indicia are met:

- the CLEC is **certificated** (or meets any state registration or certification requirements) to provide LEC services in the market; or
- the CLEC offers (via tariff or website posting, as required) any, some or all **LEC services** (local voice, exchange access, Internet access, local data) in the LATA; or
- the CLEC has active **interconnection trunks** (ordered as set forth in an interconnection agreement, SGAT or similar tariff) for the exchange of LEC services traffic with the ILEC in the LATA; or
- the circuit is connected to a **collocation** in an ILEC end office or an equivalent ILEC/CLEC collocation at a CLEC end office housing equipment used to facilitate the exchange of LEC service traffic with the ILEC and to provide such LEC services to end users; or
- the CLEC assigns a local **telephone number** associated with the circuit.

An ILEC may file an **enforcement action** at the FCC or state commission, if it has reason to believe that the CLEC has falsely pre-certified compliance or that it no longer remains in compliance with the bright-line rule set forth above.

At a CLEC's option, it may opt not to pre-certify compliance with any of the above indicia and instead accept that an ILEC may **audit** its compliance with the bright-line rule set forth above. Such audits must (a) be triggered by a probable cause standard – a demonstrable and rationally related concern regarding compliance – no random or routine audits; (b) be conducted by an AICPA-compliant independent third party auditor acceptable to both parties; (c) not require burdensome production or record keeping; (d) be limited to once in a twelve month period - barring finding of more than de minimis (>10%) non-compliance (which would justify a one audit per six month period standard until an audit uncovered no more than de minimis (>10%) non-compliance); (e) be paid for by the ILEC – with cost shifting on a pro-rata basis, if certain circuits are found to be ineligible; (f) be subject to state PUC or FCC review prior to any true-up or switch to SPA rates.